

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 19, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2011AP1843
STATE OF WISCONSIN**

Cir. Ct. No. 2007FA3272

**IN COURT OF APPEALS
DISTRICT I**

IN RE THE MARRIAGE OF:

ELYN M. FEINAUER,

PETITIONER-RESPONDENT,

V.

DAVID A. FEINAUER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL J. DWYER, Judge. *Affirmed.*

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. David Feinauer appeals portions of a judgment dissolving his marriage to Elyn Feinauer. David raises several challenges to the divorce judgment. We reject his arguments and affirm the judgment.

BACKGROUND

¶2 David and Elyn were married in February 1983, and they have two adult children. Elyn filed for divorce in June 2007. On the morning originally set for trial, the court learned that after the divorce petition was filed, David's mother, Marcella Feinauer, recorded two mortgages. The first, dated November 11, 1987, was from David to Marcella and secured by David and Elyn's marital home. No payments were made on the note from 1987 until the filing of the divorce petition. After Elyn filed for divorce, Marcella commenced an action to foreclose on the mortgage.

¶3 The other mortgage, dated December 31, 2002, was from David to his father, Arthur Feinauer, and secured by a duplex located in South Milwaukee. In addition, Marcella claimed to own a fifty percent interest in both the duplex and a third piece of real estate in South Milwaukee where David operated his auto repair business.

¶4 Elyn contested Marcella's attempt to foreclose on the couple's marital home, but David did not. The court appointed a special master to determine who had what rights to the subject real estate.¹ After many hours of hearings, the special master rendered his recommendations. Elyn and David paid the special master approximately \$22,000 for his services. Relevant to this appeal,

¹ The trial court's authority to appoint the person referred to consistently in the record as the "special master" is found in WIS. STAT. § 805.06 (2011-12), which describes the functions performed here by the "special master," although the statute uses the term "referee" to refer to the person so appointed.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the court: adopted several of the special master's recommendations; awarded Elyn indefinite maintenance in the amount of \$600 per month; and ordered David to pay \$10,000 toward Elyn's attorney fees based on overtrial. This appeal follows.

DISCUSSION

A. Attorney Fees Based on Overtrial

¶5 An award of attorney fees is discretionary. *Van Offeren v. Van Offeren*, 173 Wis. 2d 482, 499, 496 N.W.2d 660 (Ct. App. 1992). The circuit court in a divorce action may award attorney fees to one party where the other party has caused additional fees by overtrial. *Randall v. Randall*, 2000 WI App 98, ¶22, 235 Wis. 2d 1, 612 N.W.2d 737. When attorney fees are sought in an overtrial situation, there is no need to make findings of need and ability to pay. *Johnson v. Johnson*, 199 Wis. 2d 367, 377, 545 N.W.2d 239 (Ct. App. 1996). The court, however, must still determine the reasonableness of the fees. *Id.* at 377-78. Ultimately, “[t]he policy underpinning an overtrial attorney’s fees award is to compensate the overtrial victim for fees unnecessarily incurred because of the other party’s litigious actions.” *Id.* at 377.

¶6 David contends that the court’s finding of overtrial is not supported by the evidence and is inconsistent with Wisconsin foreclosure law. We are not persuaded. The court determined that appointment of the special master was necessitated by Marcella’s foreclosure action and David’s failure to contest it. Although Marcella testified that she made bona fide loans to David, the court found her testimony to be incredible based on evidence that included Marcella’s failures to record the mortgages in a timely manner and to report them on her tax returns. The court credited Elyn’s testimony that she had no knowledge of either mortgage until after the divorce petition was filed.

¶7 The court ultimately found that Marcella’s action to foreclose the mortgage was an attempt to deprive Elyn of her interest in the marital home, and David’s failure to contest the foreclosure indicated “that he was in collusion with [Marcella] in this effort.” The court adopted the special master’s recommendation that the loan from Marcella was not a valid marital obligation and further concluded that David’s acquiescence demonstrated bad faith. The record supports these findings.

¶8 David contends that because he had a legitimate reason not to defend the foreclosure, his acquiescence did not justify the court’s finding of overtrial. David asserts that posing a defense to the foreclosure could have been deemed “frivolous and contrary to [Marcella]’s rights to repayment under the terms of the mortgage.” This argument, however, is contrary to the circuit court’s determination that David was in collusion with his mother to interfere with distribution of the marital property.

¶9 David alternatively argues that the court erred by ordering him to contribute to Elyn’s attorney fees when the special master was appointed for reasons distinct from the foreclosure matter. As noted above, however, appointment of the special master was necessitated by Marcella’s foreclosure action and David’s failure to contest it. That the special master may have been charged with additional duties and powers does not alter the precipitating reason for his appointment—to determine who had what rights to the subject real estate.

¶10 Ultimately, the court properly exercised its discretion when it ordered David to contribute \$10,000 toward Elyn’s attorney fees. The court acknowledged Elyn’s own contribution to the significant attorney cost, noting the considerable time she spent litigating the value of personal property that, upon

appraisal, had only nominal value. The court found, however, that it was David and Marcella's collusion "that ... substantially increased the attorney fees incurred in this case and constitute[d] over-trial." The record supports the attorney fee award.

B. Maintenance

¶11 The determination of maintenance is a matter entrusted to the trial court's sound discretion. *Hartung v. Hartung*, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). Upon a judgment of divorce, "the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering" those factors listed under WIS. STAT. § 767.56.² On review, the

² WISCONSIN STAT. § 767.56 provides:

Upon a judgment of annulment, divorce, or legal separation, or in rendering a judgment in an action under s. 767.001(1)(g) or (j), the court may grant an order requiring maintenance payments to either party for a limited or indefinite length of time after considering:

- (1) The length of the marriage.
- (2) The age and physical and emotional health of the parties.
- (3) The division of property made under s. 767.61.
- (4) The educational level of each party at the time of marriage and at the time the action is commenced.
- (5) The earning capacity of the party seeking maintenance, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to find appropriate employment.
- (6) The feasibility that the party seeking maintenance can become self-supporting at a standard of living reasonably

(continued)

question is whether the trial court’s application of the factors achieves both the support and fairness objectives of maintenance. *Forester v. Forester*, 174 Wis. 2d 78, 84-85, 496 N.W.2d 771 (Ct. App. 1993). The first objective is to support the recipient spouse in accordance with the needs and earning capacities of the parties. “The goal of the support objective of maintenance is to provide the recipient spouse with support at pre-divorce standards.” *Fowler v. Fowler*, 158 Wis. 2d 508, 520, 463 N.W.2d 370 (Ct. App. 1990). The fairness objective is “to ensure a fair and equitable financial arrangement between the parties in each individual case.” *King v. King*, 224 Wis. 2d 235, 249, 590 N.W.2d 480 (1999) (citation omitted).

¶12 Here, David challenges the monthly maintenance award, claiming the court did not consider every factor before setting the “grossly inequitable” maintenance award. An adequate basis exists in the record to support the trial court’s determinations, and its findings are not clearly erroneous. *See* WIS. STAT. § 805.17(2). The court considered sufficient statutory factors in awarding

comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(7) The tax consequences to each party.

(8) Any mutual agreement made by the parties before or during the marriage, according to the terms of which one party has made financial or service contributions to the other with the expectation of reciprocation or other compensation in the future, if the repayment has not been made, or any mutual agreement made by the parties before or during the marriage concerning any arrangement for the financial support of the parties.

(9) The contribution by one party to the education, training or increased earning power of the other.

(10) Such other factors as the court may in each individual case determine to be relevant.

indefinite maintenance of \$600 per month. While the reasons for the court's determination on maintenance may not have been exhaustive, they need not have been. See *Burkes v. Hales*, 165 Wis. 2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991). The court reviewed the length of the parties' marriage, their health conditions, educations, earning capacities, incomes and tax consequences.

¶13 David nevertheless contends that the court did not adequately consider the division of property, noting that while he “must pay \$500 a month for rent, Elyn is living rent and mortgage free by virtue of the property division in the comfort of the home she enjoyed pre-divorce.” The court, however, stated that it did not believe Elyn could be self-supporting at the level enjoyed during the marriage—a conclusion reinforced by Elyn's health problems and current employment prospects.

¶14 The court further noted that although David reported monthly income of \$3,120, he “does his own books and his own tax returns” and “has significant opportunity to manipulate the figures.” The court added: “That this estimate of income is conservative is supported by the recreational activities and equipment that David has always purchased and maintained.” To the extent David argues that the trial court also failed to consider his payment obligations to his parents on purported mortgages, the court found that David's payments to Arthur on the duplex had become voluntary and payments to Marcella did not begin until Elyn filed for divorce. Further, as noted above, the court found that the foreclosure action on the Greenfield residence was a collusive effort between Marcella and David to deprive Elyn of her interest in the home. Ultimately, the court considered proper factors when awarding indefinite maintenance to Elyn. The court properly exercised its discretion in making the maintenance determination.

C. Findings of the Special Master

¶15 David argues the trial court erred by adopting the special master's recommendations because they are "vague, incomplete, inconsistent and without a factual basis in the record." The court adopted the following recommendations: the homestead, duplex and auto repair business were marital assets with David and Elyn each owning fifty percent interest; Marcella's mortgage on the homestead was not a marital obligation; Arthur's mortgage was not a marital obligation; and a \$20,000 debt from David to Marcella was not a marital obligation. David challenges the special master's reliance on his credibility determinations and further contends that by adopting the special master's recommendations "virtually un-amended," the special master "became the judge in this case." We are not persuaded.

¶16 WISCONSIN STAT. § 805.06(5)(a) provides that "[t]he referee shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report." Further:

In an action to be tried without a jury the court shall accept the referee's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instruction.

Section 805.06(5)(b). Further, pursuant to WIS. STAT. § 805.17(2), in a trial to the court, "the findings of a referee may be adopted in whole or part as the findings of the court."

¶17 Here, the court explained that it had carefully reviewed the special master’s proposed findings of fact, noting that “credibility findings are uniquely in the hands of the fact finder who looks at witnesses,” and that the detail in the proposed findings on the real estate “give the flesh to the bone of his decision.” With respect to the parties’ personal property, however, the court was “not satisfied” with the special master’s explanation for his recommendations and declined to adopt many of those recommendations. Further, and despite David’s claims to the contrary, the special master did not become the judge. As noted above, the court is permitted to adopt the special master’s report in whole or in part. *See* WIS. STAT. § 805.06(5)(b). Here, the court properly adopted those parts of the special master’s recommendations that it determined were supported by the record.

¶18 To the extent David challenges the credibility determinations, credibility is a matter within the province of the fact-finder. *See Jacobson v. American Tool Cos., Inc.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). A fact-finder’s credibility determination “will not be questioned unless based upon caprice, an abuse of discretion, or an error of law.” *Id.* (citation omitted). Here, the court both accepted most of the special master’s credibility determinations and made credibility determinations of its own. David gives us no reason to conclude that the court improperly accepted the special master’s findings, especially given a trial during which the court had ample opportunity to judge the accuracy of the special master’s credibility determinations.

D. Arthur’s Mortgage

¶19 Finally, David contends that the trial court erred by finding that Arthur’s mortgage on the duplex was not a marital obligation. The court credited

David's testimony that he made ten payments toward the mortgage to Arthur, but rejected David's claim that he stopped making payments because he was unable to do so. The court also rejected Arthur's claim that he needed the money for his living expenses, because "he allowed David not to pay the loan for years." The court ultimately found that, although the transaction was structured in the form of a loan from Arthur to David, "the conduct of the parties clearly indicate[d] that its repayment had become voluntary by the time the divorce was commenced." The trial court's finding was properly based on its credibility determinations and David has provided no grounds to upset either the finding or the credibility determinations on which it was based.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

